NO. 47926-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL S. WILLIAMS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
CLALLAM COUNTY, STATE OF WASHINGTON
Superior Court No. 15-1-00238-3

BRIEF OF RESPONDENT

MARK B. NICHOLS
Prosecuting Attorney

JESSE ESPINOZA
Deputy Prosecuting Attorney

223 East 4th Street, Suite 11
Port Angeles, WA 98362-3015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court erred by converting a mandatory drug fine under RCW 69.50.430 into a discretionary drug fund contribution after finding the defendant was not indigent?
2. Whether this Court should review the imposition of any other LFOs when the defendant convinced the trial court he was employed full time and did not object to any other LFOs other than the drug fine allocation?
3. Whether the court properly exercised its discretion by making an individualized inquiry into Mr. Williams' future ability to pay before imposing the $500 attorney recoupment fee?

II. STATEMENT OF THE CASE

On Aug. 18, 2016, Mr. Williams entered a plea of guilty to the crime of Possession of a Controlled Substance. CP 33. The court sentenced Mr. Williams and imposed legal financial (LFOs) obligations as follows:

$500 victim assessment
$200 criminal filing fee
$500 court appointed attorney recoupment
$100 DNA fee
$500 to drug court
$500 to Olympic Narcotics Enforcement Team

CP 26–27.

Prior to imposing Legal Financial Obligations (LFO's), the sentencing

court inquired of Mr. Williams ability to pay. RP 6 (8/18/15). The court asked Mr. Williams whether he was employed, where he is employed, how long he had been employed, whether Mr. Williams was licensed as a plumber, whether he enjoyed that type of work, and whether it was full time work. RP 6–7. Mr. Williams responded that he had been employed at Tom's Plumbing for about 4 to 5 months, was in the process of getting a training card to become an apprentice, that he enjoyed that type of work, and that it was full time work. RP 6–7.

The trial court imposed the recommended LFOs and found the defendant has a good work ethic and wants to get his apprenticeship going. RP 7. The court set Mr. Williams' monthly payment at $40 per month. RP 9.

Defense counsel inquired whether the court was finding Mr. Williams to be indigent and waiving the drug fine. RP 11. The court answered "No" and that it was not waiving the drug fine but was splitting the $1000 drug fine and allocating it between Drug Court and the Olympic Narcotics Enforcement Team (OPNET). RP 10–11. The court admitted it that it was doing so due to a past practice and without knowledge of the statutory authority. RP 10–11.

//

III. ARGUMENT

A. THE COURT ERRED BY CONVERTING A MANDATORY DRUG FINE INTO A DISCRECTIONARY DRUG FUND CONTRIBUTION BECAUSE THE COURT FOUND MR. WILLIAMS WAS *NOT* INDIGENT.

> Every adult offender convicted of a felony violation of RCW 69.50.401 through 69.50.4013, 69.50.4015, 69.50.402, 69.50.403, 69.50.406, 69.50.407, 69.50.410, or 69.50.415 must be fined one thousand dollars in addition to any other fine or penalty imposed.
>
> *Unless the court finds the adult offender to be indigent*, this additional fine may not be suspended or deferred by the court.

RCW 69.50.430 (1) (emphasis added).

Here, Mr. Williams was convicted of the crime of Possession of a Controlled Substance contrary to RCW 69.50.4013. CP 20, 50. The trial court was required to impose a $1000 fine pursuant to RCW 69.50.430 (1). When defense counsel asked the trial court if it was finding Mr. Williams to be indigent and waiving the drug fine, the trial court stated, "No." RP 11 (8/18/15). The trial court also stated, "I wasn't waiving the drug fine. That was not my intent." RP 11. Therefore, the trial court was required to impose the fine in full.

However, the Court did not impose a fine. Rather, the court imposed a contribution to a county or interlocal drug fund when it assessed $500 to Drug Court and $500 to OPNET. This appears to be the result of a misunderstanding that the authority for the drug fine and the authority to

impose drug fund contributions are derived from difference sources and each involve separate inquires.

Ultimately, the trial court was not authorized to waive the drug fine because Mr. Williams was not found to be indigent. The trial court also did not articulate that it was imposing a separate drug fund contribution independent of the drug fine. The drug fine and drug fund contribution were conflated.

The State concedes that the court had no authority to waive the drug fine and that the case should be remanded so that the sentence may be corrected and so the imposition of $1000 drug fine is re-characterized as a fine pursuant to RCW 69.50.430 and not a $500 contribution to OPNET and $500 to Drug Court.

This leaves the other LFOs which include the $500 victim assessment, $200 court filing fee, $100 DNA fee, and the $500 attorney recoupment fee.

B. THE COURT SHOULD DECLINE TO REVIEW THE IMPOSITION OF ANY OTHER LFOs BECAUSE MR. WILLIAMS DID NOT OBJECT AT SENTENCING.

Mr. Williams cites to *State v. Ford*, 137 Wn.2d 472, 477–78, 973 P.2d 452 (1999) as a basis for his appeal. However, "[u]npreserved LFO errors do not command review as a matter of right under *Ford* and its

progeny." *State v. Blazina*, 182 Wn.2d 827, 833, 344 P.3d 680 (2015).

> Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.

RAP 2.5 (a).

> A defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review. It is well settled that an "appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). This rule exists to give the trial court an opportunity to correct the error and to give the opposing party an opportunity to respond. *State v. Davis*, 175 Wash.2d 287, 344, 290 P.3d 43 (2012), cert. denied, —— U.S. ——, 134 S.Ct. 62, 187 L.Ed.2d 51 (2013).

Blazina, 182 Wn.2d at 832–33; *see also State v. Kuster*, 175 Wash. App. 420, 425-26, 306 P.3d 1022, 1025 (2013) (declining to review imposition of $200 court filing fee.)

Here, Mr. Williams did not object to the imposition of any other LFOs except as discussed above. Therefore the imposition of any other LFO is not reviewable as a matter of right. Additionally, Mr. Williams has not met his burden establishing an exception to RAP 2.5 which would entitle him to review as a matter of right.

Therefore, the Court should decline to review the imposition of any other LFOs.

C. THE COURT PROPERLY IMPOSED MANDATORY LEGAL FINANCIAL OBLIGATIONS.

> [F]or mandatory legal financial obligations, the legislature has divested courts of the discretion to consider a defendant's ability to pay when imposing these obligations. For victim restitution, victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant's ability to pay should not be taken into account. *See, e.g., State v. Kuster*, No. 30548–1–III, 2013 WL 3498241 (Wash.Ct.App., July 11, 2013).

State v. Lundy, 176 Wn. App. 96, 102–03, 308 P.3d 755 (2013).

> The trial court imposed a $500 victim assessment fee, a $200 criminal filing fee, and a $100 DNA collection fee. RCW 7.68.035, RCW 36.18.020(2)(h), and RCW 43.43.7541 respectively mandate the fees regardless of the defendant's ability to pay. Trial courts must impose such fees regardless of a defendant's indigency. *State v. Lundy*, 176 Wash.App. 96, 102, 308 P.3d 755 (2013). *Blazina* addressed only discretionary legal financial obligations.

State v. Stoddard, No. 32756-6-III, 2016 WL 275318, at *1 (Wn. Ct. App. Jan. 12, 2016).

The court properly imposed the $500 victim assessment, $200 criminal filing fee, and $100 DNA fee. Mr. Williams did not object. Therefore, the Court should decline to review the imposition of these mandatory fees. *See Kuster*, 175 Wash. App. at 425–26.

D. THE $500 ATTORNEY RECOUPMENT FEE WAS PROPERLY IMPOSED BECAUSE THE COURT INQUIRED INTO MR. WILLIAMS' ABILITY TO PAY.

> The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount

> and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160 (3).

> The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider important factors, as amici suggest, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015).

Mr. Williams argues that the LFOs should be reversed because the court did not asked Mr. Williams how much money he expected to make, his other expenses, debt, and obligations, and whether he had savings.

The court was not required to have a formal fact finding in order to make a determination of ability to pay especially when Mr. Williams told the court he was employed and did not object to the imposition of the LFOs except for the drug fine allocation. *See State v. Baldwin*, 63 Wn. App. 303, 311–12, 818 P.2d 1116, 1120 (1991) amended, 837 P.2d 646 (Wn. Ct. App. 1992).

However, there needs to be a record supporting the finding of future ability to pay. *See Id.* Employability may provide a factual basis for a defendant's future ability to pay. *Id.* at 311.

Here, the trial court inquired of Mr. Williams whether he was employed or not and Mr. Williams stated that he was employed at Tom's

Plumbing. RP 6 (8/18/15). Mr. Williams informed the court that he had been employed at Tom's Plumbing for 4 or 5 months and was a full time employee. RP 6–7. Further, Mr. Williams stated that he was in the process of filing for his training card and would be an apprentice as soon as he filled out the training card. RP 7.

Mr. Williams clearly demonstrated that he had an income from full time employment and that he was working on improving his employment through an apprenticeship. Additionally, the court imposed $800 in mandatory fees and no restitution. The month of jail was converted to community service work. CP 23. Therefore, the court was well aware of some of Mr. Williams' other debts, restitution, and incarceration but it was clear that Mr. Williams was going to keep his job.

There was a factual basis for the trial court to find Mr. Williams had the future ability to pay and the court properly imposed the $500 attorney recoupment fee. Moreover, Mr. Williams did not object and is not entitled to review as a matter of right. Therefore, the Court should decline to review the imposition of the $500 attorney recoupment fee.

IV. CONCLUSION

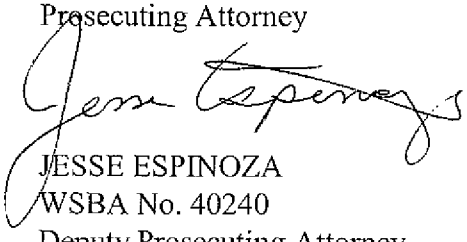
The State concedes that the trial court erred by effectually waiving the $1000 VUCSA fine by splitting it between drug court and OPNET because the court found Mr. Williams was not indigent.

The mandatory LFOs are to be imposed at sentencing without regard to ability to pay. Mr. Williams did not object to the imposition of any other LFOs and did not establish an exception under RAP 2.5. Finally, the court did make an individualized inquiry into Mr. Williams' future ability to pay. Mr. Williams convinced the court that he was employed full time and the $40 monthly payment was reasonable. For the foregoing reasons, the Court should decline to review the imposition of LFOs.

Respectfully submitted this 29th day of February, 2016.

Respectfully submitted,

MARK B. NICHOLS
Prosecuting Attorney

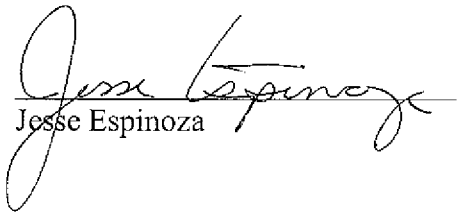


JESSE ESPINOZA
WSBA No. 40240
Deputy Prosecuting Attorney

CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Peter B. Tiller on February 29, 2016.

MARK B. NICHOLS, Prosecutor



Jesse Espinoza

CLALLAM COUNTY PROSECUTOR

February 29, 2016 - 3:38 PM

Transmittal Letter

Document Uploaded: 7-479265-Respondent's Brief.pdf

Case Name: State of Washington, Respondent, v. Michael S. Williams, Appellant.
Court of Appeals Case Number: 47926-5

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Jesse Espinoza - Email: jesspinoza@co.clallam.wa.us

A copy of this document has been emailed to the following addresses:

ptiller@tillerlaw.com